Editor's note: 78 I.D. 71; Reconsideration denied by Director's letter dated June 25, 1971; Appealed – aff'd, Civ. No. 74-68-RDF (D. Nev. June 15, 1976), reconsideration denied (Aug. 17, 1977), aff'd, No. 77-3429 (9th Cir. July 10, 1980), 624 F.2d 192 (table), cert. denied, S.Ct. No. 80-1181 (March 23, 1981), 450 U.S. 997, 101 S.Ct. 1700; See also US v. William McCall, 7 IBLA 21 (July 26, 1972).

UNITED STATES
v.
WILLIAM A. McCALL, SR.,
THE DREDGE CORPORATION,
ESTATE OF OLAF H. NELSON, deceased,
SMALL TRACT APPLICANTS ASSOCIATION, Intervenor

IBLA 70-309 through 70-329 Decided March 22, 1971

Mining Claims: Discovery: Marketability – Mining Claims: Common Varieties of Minerals: Generally

> To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date. Where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, is insufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void.

Mining Claims: Discovery: Marketability

> To satisfy the requirement that deposits of minerals of widespread occurrence be "marketable" it is not enough that they are only theoretically capable of being sold but it must be shown that the mineral from the particular deposit could have been extracted, sold, and marketed at a profit.

Mining Claims: Discovery: Marketability – Mining Claims: Location

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

IBLA 70-309
through 70-329

Mining Claims: Discovery: Marketability

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date and where claimants fail to make such a showing the claim is properly declared null and void.

Rules of Practice: Hearings – Mining Claims: Hearings

It is proper to allow a third party to intervene in a proceeding where an interest of the intervenor may be affected by the outcome of the proceeding.

IBLA 70-309 through 70-329	:	
UNITED STATES,	:	Nevada Contests 3092-3095,
	:	3097-3106, 3108-3113, and 3224
Contestant,	:	
v.	:	Placer mining claims declared
WILLIAM A. McCALL, SR.,	:	null and void
THE DREDGE CORPORATION,	:	
ESTATE OF OLAF H. NELSON, deceased,	:	
Contestees,	:	
	:	
SMALL TRACT APPLICANTS ASSOCIATION,	:	
Intervenor	:	Affirmed

DECISION

William A. McCall, Sr., and the other contestees have appealed to the Director, Bureau of Land Management, 1/ from a decision dated August 15, 1968, whereby a hearing examiner declared the Las Vegas Nos. 3 through 6, 8 through 17, 19 through 23, 25 and 26 placer mining claims null and void on the ground that the sand and gravel for which the claims were located are common varieties within the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1964), and there was no discovery of a valuable mineral deposit on any of the claims because there was no market for the mineral material found on the claims as of the date of the Act. The decision also rejected the application for mineral patent Nevada 012928, and denied the motions by the contestees to dismiss the contest under the act of March 3, 1891, 43 U.S.C. § 1165 (1964), and to deny intervention by the Small Tract Applicants Association.

The Las Vegas group of placer mining claims was located March 20, 1948, by Vernon D. Bradley, John W. Bonner, N. C. Bradley, and G. C. Bradley. Each claim includes 80 acres, and in toto, these contested claims encompass 1,680 acres, described as all section 15, W 1/2, W 1/2 SE 1/4 section 22, S 1/2 section 27, S 1/2 NE 1/4, N 1/2 S 1/2 section 28, S 1/2 SE 1/4

1/ The Secretary of the Interior in the exercise of his supervisory authority transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Circular 2273, 35 F.R. 10009, 10012.

section 29, T. 20 S., R. 60 E., M.D.M., Clark County, Nevada. The claims are adjacent to the boundary of Las Vegas City, and are approximately 5 miles from the Clark County Courthouse in the center of Las Vegas.

By an instrument dated June 1, 1948, the four original locators released and quit claimed their interests in the Las Vegas group of claims to O. H. Nelson, who subsequently quit claimed an undivided one half interest in these claims to William A. McCall, Sr., in an instrument dated September 24, 1952. Nelson and McCall filed application Nevada 012928, on March 27, 1953, for patent to the Las Vegas group of placer mining claims. The land office manager at Reno, Nevada, issued a final certificate on these claims on October 8, 1954. 2/ The Las Vegas number 23 claim was conveyed to the Dredge Corporation by a quit claim deed dated March 27, 1959.

The present proceedings arose from complaints, Nevada 3092-3095, 3097-3106, 3108-3113, issued March 18, 1960, by the land office manager against the Las Vegas Nos. 3 through 6, 8 through 17, 19 through 22, 25 and 26 placer mining claims, charging that the land within the limits of each claim is nonmineral in character and that no discovery of valuable mineral has been made within the limits of the claims because the materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials. Complaint Nevada 3224 against the Las Vegas No. 23 claim, issued June 1, 1961, charged that the land embraced within the claim is nonmineral in character, and that no discovery of a valuable mineral has been made within the limits of the claim because no actual market for the mineral materials claimed existed before July 23, 1955, and that these minerals are not considered a valuable mineral deposit under section 3 of the Act of

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2/ Mineral patent application Nevada 012928, filed March 27, 1953, included Las Vegas 1 through 23, 25 through 27 placer mining claims in sections 15, 22, 27, 28 and 29, T. 20 S., R. 60 E., M.D.M., Clark County, Nevada. The land office manager issued a certificate October 8, 1954. Patent 1211178 was issued August 4, 1960, for 40 acres described as SW 1/4 NE 1/4 section 22, T. 20 S., R. 60 E., M.D.M., in Las Vegas 7, supplanting another patent 1211178 inadvertently issued on the same date for 400 acres, being all of the land in Las Vegas 1, 2, 7, 18 and 27. Patent 27-65-0095 was issued September 25, 1964, for 190 acres described as SE 1/4 SE 1/4, S 1/2 NE 1/4 SE 1/4, NE 1/4 NE 1/4 SE 1/4 section 22 (in Las Vegas 1), SE 1/4 NE 1/4, E 1/2 NE 1/4 NE 1/4 section 22 (in Las Vegas 2), S 1/2 S 1/2 NW 1/4, NE 1/4 SE 1/4 NE 1/4 section 27 (in Las Vegas 18), and SE 1/4 NE 1/4 NW 1/4 section 27 (in Las Vegas 27).

July 23, 1955; therefore, any market for such materials developed after that date does not constitute a valid discovery within the mining laws. The Las Vegas No. 23 claim was consolidated into patent application Nevada 012928 by the Secretary's decision, United States v. McCall, A-29161 (July 30, 1962).

The contestees filed timely answers denying the charges. On April 20-23, 1965, a hearing on all the complaints was held at Las Vegas, Nevada, before a hearing examiner who set forth his findings and conclusions in the decision of August 15, 1968, the subject of this appeal.

The appellants contend essentially that the hearing examiner's decision is contrary to the evidence, that the provisions of the act of July 23, 1955, 30 U.S.C. § 611 (1964), do not apply to these mining claims which were located in 1948, that it is illegal to apply the rule of "marketability at a profit," that the contests are barred by 30 U.S.C. § 38, and that it was illegal to allow intervention by the Small Tract Applicants Association.

The contestant filed a brief in support of the hearing examiner's decision generally, and the intervenor filed a brief in support of the hearing examiner's decision insofar as it permitted the intervention.

As the appellants contend the hearing examiner's decision is contrary to the evidence, and the appellee to the opposite effect, we shall set forth the salient points adduced at the hearing.

Witnesses appearing for the contestant were George O. Scarfe, Jr., a valuation engineer (mining), employed by the Bureau of Land Management, and Lewis G. Chichester, the assistant land office manager for the Branch of Mining, Nevada land office, each qualified as an expert witness. Scarfe testified that he, by himself, had made several examinations of the Las Vegas group of placer mining claims in June, July and August 1959, and again in the company of Chichester in July 1963 and January 1965. He described the claims, identified by reference to established and found cadastral survey corners, as lying on an alluvial fan at an elevation of approximately 2500 feet, with a general slope of 2% toward the east. The alluvium is mostly limestone fragments, ranging in size from boulders to silt, and with some aeolian deposits in the top one foot. A caliche capping is present, varying from exposure at the surface to a depth of four feet. There is loose sand and gravel above the caliche throughout the area of the claims, as well as rework gravel in the washes which cross the claims. Scarfe described the caliche as a calcareous cement on the limestone deposits, formed by evaporation of the ground

water. The caliche capping can be broken by blasting and, after treatment, the rock can be used as ordinary gravel. The material on these claims is similar to that found extensively in the Las Vegas Valley and is suitable for base course filling in highway construction, bituminous mix, and concrete aggregate. Scarfe submitted a sketch map of section 15, 22, 27 and 28, T. 20 S., R. 60 E., (Ex. G-14), showing the location of the Las Vegas claims, depth of surface sand and gravel above the caliche layer, development workings such as shafts, trenches and bulldozer cuts on each claim, and surface improvements such as roads and power lines, as they existed on September 20, 1959. He described the shafts as having been dug by means of blasting and backhoe excavation, and the trenches as having been dug by hand. He stated that there was no evidence whatsoever of any mining on the contested Las Vegas claims before his examinations in 1959. He submitted another sketch map, Ex. G-15, showing the same area as Ex. G-14, depicting the locations of 64 pits which had been dug as additional development workings by July 31, 1963. His examination of the new shafts showed much silt-like lacustrine deposits in the Las Vegas Nos. 3, 4, 5, and 6 claims. The caliche-coated material exposed in the shafts could be mined, but would require more treatment at a greater expense to make it safisfactory for use as aggregate. He described a pit which had been opened on the Las Vegas Nos. 12 and 13 claims, in which considerable mining had been done recently, with the material screened and stock-piled on the claims, although there had been some hauling of finished material during his examination. The screening had developed a large amount of "fines," which do not meet road specifications. The pit operation in the Las Vegas Nos. 12 and 13 claims had been blasted through the caliche, with the excavation about 20 feet deep, where another layer of dense cementation was encountered. The gravel, however, was mineable. Scarfe stated his opinion that most of the material on the contested claims, excepting the lake-bed material and the caliche capping, would make specification gravel. He stated that any operation prior to 1959 would have been compelled to break the caliche by drilling and blasting before excavation would be possible, and these things would have increased greatly the overall cost to obtain usable gravel. The competitors operating in neighboring pits are mining gravels having much less caliche-cement. Overall, though, the material on the Las Vegas claims is very much similar to that found widespread throughout the Las Vegas Valley area. The material on these contested claims has no special or distinct characteristics or properties which make the deposits unique. Scarfe said that one shaft on each claim was sampled for gold, with negative results from each claim. He stated that he recommended the contest proceedings as it was his opinion, considering both the "prudent man rule" and the "marketability rule" and the Act of July 23, 1955, supra, that a valid discovery of a valuable mineral deposit had not been made on any of the claims.

Chichester testified that he had accompanied Scarfe in July 1963 to examine the claims, and having heard all the Scarfe testimony, he declared he would have given substantially the same answers in response to the questions asked. He then testified as to Las Vegas No. 23 claim, which Scarfe had not examined, stating that insufficient exploration work had been done by the claimants. This claim, in the S 1/2 SE 1/4 section 29, cornering on the Las Vegas No. 22 claim, is dissected by a major wash some 35 feet deep. Cemented gravels derived from limestone and dolomite are present. He defined "caliche" as "cemented gravels." He gave his opinion that each claim lacks a valid discovery, and added that except for the provisions and limitations of Public Law 167, Act of July 23, 1955, supra, the Las Vegas Nos. 5, 12 and 13 claims might be considered valid locations as they can be operated profitably in the present Las Vegas area market for sand and gravel. All the other claims have too much blow sand and caliche cementation to support any profitable operations, even if presently subject to mining claim location.

Several witnesses appeared on behalf of the contestees. Vernon D. Bradley, one of the original locators of the Las Vegas group of claims, testified that in 1948 he was the major producer of sand and gravel in the Las Vegas Valley, and he had located the Las Vegas group of claims as future reserves for his plant on the Best Bet placer mining claim in S 1/2 NE 1/4 section 27, T. 20 S., R. 60 E. This claim has since been patented. He stated he had done the necessary discovery work on each claim and had removed perhaps 50 to 100 yards of material from each claim. He sold the Las Vegas claims to Olaf Nelson, and other adjacent claims to William McCall and to Wells Cargo Company. He was unable to state that Nelson had removed material from the contested claims, although much material was taken from the Las Vegas Nos. 1, 2 and 7. He said he was hired in 1956 or 1957 by Nelson and McCall to dig exploratory holes on each 10-acre subdivision of each of the contested Las Vegas claims. The excavated material was run through the plant on the Best Bet claim, and was used on a job at the Las Vegas City Jail. Bradley stated that before washing plants were installed in the area, most gravel excavation was done in the bottom of dry washes where there was no excess of fines. On cross-examination, Bradley stated that he did not know of the removal of any significant amounts of material from the contested claims although Nelson did take lots of material from the Las Vegas Nos. 1, 2, 7 and 18. (Patents have since been issued for all or parts of these claims.) He said he had done no exploratory work on the Las Vegas Nos. 3, 4, 5, 6, 11, 12, 13 and 14 claims while he owned them, but in 1957 he had dug small pits on each of these claims at the behest of Nelson. The Las Vegas claims have been used as dumping grounds for excess unusable materials from other sources

in the past. He stated the Las Vegas claims were located as a source of good gravel close to the City of Las Vegas, but were not operated because the Best Bet provided all the materials he needed for his operations in 1948, although he did take small amounts of surface gravel in the washes on some of these claims, for use in blending with Best Bet gravels.

Stanley Hansen, vice president and general manager of Wells-Stewart Construction Company, highway contractors, testified that his company had been operating on the Las Vegas Nos. 12 and 13 claims since 1963, but had done no work on the claims prior to 1963. He stated that some 400,000 tons of material had been extracted from these claims in 1964. He said that material on these claims could be processed into Type 1 and Type 2 material for roads, and for plant mix surface, but from 3 to 7% was wasted as fines in screening for Type 2 material. He testified that hauling costs are a very important factor in supplying aggregate for road construction, and that his company tries to keep the hauling distance under three miles.

Joe W. Wells, president of Wells Cargo Company, a construction firm, testified that he had obtained title to the Best Bet claim in 1949 for a source of sand and gravel for local use, and that he had an agreement dated March 24, 1959, with Nelson and McCall to obtain a 20% interest in the Las Vegas group of claims after doing the exploration work on each 10-acre subdivision of each claim. The exploration work cost approximately $25,000. He said that the material on the Las Vegas claims would be processed into sand and gravel meeting all specifications for both highway and building construction. He said he was aware of operations on the Las Vegas claims since 1948, but he had no specific knowledge as to work on any individual claim in this group. He stated that the cemented gravels could be broken by shooting and then processed to meet any standard specifications. Such processing is more expensive and therefore little production of such gravel occurred in the period prior to 1959, but now a big ripper mounted on a heavy "cat" can break the cemented gravels. Water soaking is efficacious to dissolve the "cement," and smaller cats can be used for ripping after such soaking. He stated it is cheaper to drill a water well and soak the cemented material in place than it is to shoot or dry rip. The economics of the situation precluded much blasting to break the cemented gravels prior to 1957. He predicted a much greater need for sand and gravel in the Las Vegas area in upcoming years, so that the Las Vegas claims are ideally situated to supply future construction needs in the area.

Howard Greer, an employee of J. M. Murphy Construction Company, testified that Murphy had operated a plant from 1948 to 1952, producing

Type 2 base material on the Las Vegas No. 18 claim, but he could not state that material was extracted from any other of the Las Vegas claims for that operation. He said that all of the contested Las Vegas claims have sand and gravel.

Eton Stout, a contractor, testified that he is operating a hot mix plant on the patented Homesite claim, N 1/2 NE 1/4 section 27, with his pit some 35 feet deep. He is of the opinion that the pit could be deepened another 75 feet through good gravel, but such a depth would damage the property for other uses, leaving only a large hole. Also, he stated the costs of mining would be increased by the lifting haul from the bottom of such a deep pit. He said he had tested materials on the Las Vegas Nos. 19, 20, 25, and 26, finding a little hardpan on top, but very good gravel below. He stated the hardpan had been successfully broken by a D-9 cat with a ripper. In his opinion, the Las Vegas Nos. 3, 4, 5, 6, 11, 12, 13 and 14 in section 15 would be easier to mine as there is less hardpan in that area, and the gravel material is similar to that found throughout the whole area of the claims. He stated there is no caliche on any of these claims, as caliche is never gravel. The cemented gravels are not caliche. They can be broken by ripping, with or without water soaking, and then run through a crusher and screened into the type material desired.

Elvin Hitchcock, formerly employed by Vernon Bradley, testified that he had heard all of Bradley's testimony and, that if asked the same questions on examination or cross-examination, he would give substantially the same answers.

William C. Hartman, vice president of Wells Cargo, stated that he superintended the drilling of the pits on each 10-acre subdivision of the Las Vegas claims, excepting Las Vegas No. 23, after Wells Cargo had bought a 20% interest in the claims in 1959. The pits were drilled to a depth of 10 feet and shot, then cleared by a backhoe. The resulting pits were from 7 to 10 feet wide, 20 to 25 feet long, and at least 12 feet deep. Sand and gravel were found in every hole, but with variations according to the location of the pit on the alluvial fan; that is, some pits had coarser deposits, some finer, but all were substantially sand and gravel from top to bottom. The gravels from these claims are still able to meet the more stringent specifications now imposed. In his opinion, Hartman stated the cemented gravels, after crushing, are equally as good as the loose gravels for either road or other construction. At the present time, horticulture provides a market for the excess fines recovered from screening operations. Hartman defined caliche as a tightly cemented calcareous fine material, very dense and with no rocks. Cemented gravel is variable in composition. The highly cemented gravel is

actually a variable conglomerate and resembles ordinary concrete when broken. There are no true caliches in the Las Vegas claims, only cemented gravels.

Howard Green, one of the intervenors, testified relative to the small tract applications which had been filed for some of the lands embraced in the Las Vegas claims, but submitted nothing bearing on the question of the validity of the mining claims.

The basic principles of law applicable to this case are now well established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . . Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called marketability test. United States v. Coleman, supra. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation, 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Osborne v. Hammit, Civil No. 414, D. Nev. (August 19, 1964).

Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. § 611 (1964), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. Palmer v. Dredge Corporation, supra; United States v. Barrows, 404 F.2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969).

There is no contention that any of the claims has an uncommon variety of sand or gravel, and, indeed, the evidence shows clearly that the mineral material present is of an ordinary nature and common variety, similar to that found widespread throughout Las Vegas Valley. We turn, therefore, to a consideration of the evidence bearing on the marketability as of July 23, 1955, of the sand and gravel from these contested claims.

The Government's expert witness, Scarfe, testified that he found no evidence of any mining activity when he examined the claims in 1959, and that the caliche-coated material probably could not have been mined, crushed, and processed into material usable for fill except at a much greater cost than would be required to extract and process the unconsolidated sands and gravels on other mining claims in the near vicinity.

Testimony was given that larger equipment now available can break the cemented gravels, so that they are suitable for common usages of sand and gravel, and that water soaking can be employed and the gravels mined with smaller equipment.

The original locator of the Las Vegas claims, a leading purveyor of sand and gravel in the Las Vegas market in 1949, testified that he had satisfied the demand for sand and gravel from other claims adjacent to these contested Las Vegas claims and from sources elsewhere in Las Vegas Valley, and that he had located these Las Vegas claims as a reserve for future operations, but had taken some small amounts of surface material from the washes that cross these claims.

Testimony was given to the effect that the demand for sand and gravel in the Las Vegas area was increasing so there was a growing need for the materials from these claims. But it was adduced that road contractors, who need large amounts of material, try to find sources of gravel for fill within three miles of the construction area, as hauling costs make up a large part of the cost of sand and gravel, and hauling beyond three miles limits the marketability of sand and gravel for road construction purposes.

Much of the testimony relating to operations and production of sand and gravel prior to July 23, 1955, related to the Las Vegas Nos. 1, 2, 7, 18 and 27 claims, rather than to the Las Vegas claims included in these contests.

The best that can be said for the testimony on behalf of the contestees is that there was a general demand for sand and gravel in

the Las Vegas area of the type present on these claims, but nothing was adduced to indicate that the cemented gravels prevalent on these claims could have been mined, processed and marketed at a profit before July 23, 1955. The testimony was insufficient to show a discovery because to satisfy the present marketability test the claimants must show the existence of a demand for the material on the specific claims and not simply a general demand for the type of material in question. United States v. Harold Ladd Pierce, 75 I.D. 270 (1968); United States v. Everett Foster, 65 I.D. 1 (1958); aff'd in Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Loyd Ramstad and Edith Ramstad, A-30351 (September 24, 1965); United States v. J. R. Osborne, 77 I.D. 83 (1970); United States v. William A. McCall and R. J. Kaltenborn, 1 IBLA 115 (1970); United States v. Neil Stewart, 1 IBLA 161 (1970).

The claimants contend the successful mining operations on similar mineral materials in the adjacent Las Vegas Nos. 1, 2, 7, 18, and 27 claims and in other claims nearby, before July 23, 1955, is adequate proof that these claims could also have been operated at a profit in that period. This is the same type of theoretical evidence which the court in Osborne v. Hammit, supra, found to be insufficient to satisfy the marketability test as to similar placer mining claims in the Las Vegas area. A further discussion of Osborne v. Hammit is given in United States v. Osborne, supra, United States v. Ramstad, supra, and United States v. Keith J. Humphries, A-30239 (April 16, 1965).

Obviously the claimants have failed to show that by reason of present demand, bona fides in development, proximity to market and accessibility, and other factors, the deposits on these Las Vegas claims were of such value that they could have been mined, removed and disposed of at a profit as of July 23, 1955.

The hearing examiner correctly found from the evidence that no discovery of any valuable mineral deposit had been made on any of these contested mining claims prior to July 23, 1955.

The contention that it was improper to admit the intervenors into these proceedings is without merit. Although the present rules of practice of this Department do not specify the procedure for intervention, we deem it proper to allow third party intervention where an interest of the intervenor may be affected by the outcome of the proceeding. See Fed. R. Civ. P. 24. The hearing examiner was not in error to permit intervention by the Small Tract Applicants Association in these proceedings.

The contention that the Las Vegas claims are valid under Rev. Stat. § 2332, 30 U.S.C. § 38 (1964), has no merit. This section provides:

> Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

The contestees assert that they have satisfied all the requirements of the statute. Under consistent rulings of this Department and of the courts, a valid discovery of a valuable mineral deposit is essential to establish the validity of a mining claim, even in view of section 2332, Revised Statutes, 30 U.S.C. § 38, Cole v. Ralph, 252 U.S. 286, 307 (1919); United States v. Alice A. and Carrie H. Boyle, 76 I.D. 318 (1969). Under circumstances as in these proceedings where the evidence falls far short of that required to establish a valid discovery as of July 23, 1955, the claims were properly declared null and void.

Similarly the appellants' contention that they are entitled to a patent pursuant to the provisions of section 7 of the Act of March 3, 1891, as amended, 43 U.S.C. § 1165 (1964) is without merit for that section does not apply to the mining laws. Palmer v. Dredge Corporation, supra.

The contention that the hearing examiner submitted a draft decision to the Department for approval prior to promulgation is not supported by the record. Whatever may have been intended in the hearing examiner's letter of January 12, 1967, to Howard Greene, with copies to the attorneys for the contestant and for the contestees, the decision of August 15, 1968, is the independent conclusion of the hearing examiner made without prior review by the Department.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Martin Ritvo, Member

We concur:

Francis Mayhue, Member

Edward W. Stuebing, Member.